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**In the Supreme Court  
of the United States**

No. ~~151~~ of 1950  
1951

GEORGIA RAILROAD & BANKING CO.,  
*Appellant*

vs.

CHARLES D. REDWINE, State Revenue  
Commissioner,  
*Appellee*

**BRIEF IN OPPOSITION TO  
MOTION TO DISMISS OR AFFIRM**

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# In the Supreme Court of the United States

No. ....

GEORGIA RAILROAD & BANKING Co.,  
*Appellant*

vs.

CHARLES D. REDWINE, State Revenue  
Commissioner,  
*Appellee*

APPEAL FROM THE  
UNITED STATES  
DISTRICT COURT  
FOR THE  
NORTHERN  
DISTRICT OF  
GEORGIA.

## BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

### *Jurisdiction of Appeal Conceded.*

Appellee admits that the appeal is one of which the Supreme Court has jurisdiction (His Motion, page 1), but contends that it should be dismissed or affirmed because the merits of the appeal are so unsubstantial as not to require argument or consideration by the Court.

### *Action Not Prohibited by 11th Amendment.*

In order to sustain the judgment of the Court below it will be necessary for this Court to overrule two decisions of this Court involving this same appellant, or its lessees, and involving this same charter provision and brought in precisely the same manner as this case.

*Wright v. Georgia Railroad & Banking Co.,*  
216 U. S. 426.

*Wright v. Louisville & Nashville Railroad Co.,*  
236 U. S. 687.

If appellee is right in his contentions in this case, then the Court was without jurisdiction of both of the above cases and both were wrongly decided, for both of the above cases were precisely the same action as this case.

In addition this Court has directly decided that a suit to enjoin the collection of a tax on the grounds that it is contrary to a contractual provision in the charter of the plaintiff is not a suit against the State.

*Allen v. B & O Railroad,*  
114 U. S. 311.

*Gunter v. Atlantic Coast Line,*  
200 U. S. 273.

*Board of Liquidation v. McComb,*  
92 U. S. 531.

Affirmance of the judgment of the trial court will in effect overrule the above cases.

Certainly it cannot be said that an appeal based squarely on the repeated decisions of this Court, which have never been overruled or questioned, is so unsubstantial as to require dismissal or affirmance without consideration.

Appellee cites no decision of this Court in support of his contention that the judgment of the trial court should be affirmed on the grounds decided by the District Court.

Appellee is in error in his statement in Section 2 of his motion that the decision of the Supreme Court of Georgia in *Musgrove v. Georgia Railroad & Banking Co.*, 204 Ga. 139, was affirmed by this Court. On the contrary, the appeal was dismissed by

this Court on the grounds that the Supreme Court of Georgia decided only a question of Georgia practice not involving any federal question and that this Court was therefore without jurisdiction.

*Georgia Railroad & Banking Co. v. Musgrove,*  
335 U. S. 900.

In his motion to dismiss that case, appellee said:

"Appellant bases its appeal on an erroneous assumption that the Supreme Court of the United States will assume jurisdiction on a decision of a State Court construing a State Statute providing for certain actions which may be filed in State Courts. The petition of Appellant against Appellee was based on a new statute, that of 1945 authorizing the granting of declaratory judgments in certain cases. The decision of the Supreme Court of Georgia ordered the petition dismissed on the grounds that declaratory judgment was not Appellant's remedy."

This Court agreed with appellee in that case and dismissed the appeal on that ground.

The dismissal of an appeal from the Supreme Court of Georgia on the grounds that the Georgia Court decided only a question of State practice not involving any federal question, certainly cannot be an adjudication of the right to sue in the Federal Court, which is certainly based on federal law.

*Court Has Jurisdiction  
to Enforce Prior Decree.*

If, as appellee contends and the court below held, this action

is against the State of Georgia, then the prior decree, affirmed by this Court (*Wright v. Georgia Railroad & Banking Co.*, 216 U. S. 420), was equally against the State of Georgia, for the two actions are cast in exactly the same form and pray exactly the same relief. And if the prior decree was against the State of Georgia, then the State of Georgia is bound by that decree and the court below had jurisdiction to enforce its decree. The immunity of the State from suit is a personal privilege that may be waived, and is waived by permitting the suit to go to final decree without objection. The State cannot litigate to final decree, taking its chances of winning, and then after the decree has become final ignore it on the grounds that the action was against the State.

*Gunter v. Atlantic Coast Line,*  
200 U. S. 273.

The final decree affirmed by this Court adjudicated that the court below had jurisdiction, just as it adjudicated every other fact necessary for the decree.

*Chico County Drainage Dist. v. Baxter State Bank,*  
308 U. S. 371.

And if, as appellant contends, the prior action was not originally against the State, even so when the State through its duly authorized officers not only defended the action on behalf of the State but affirmatively asked the Court to decide the question on behalf of the State, the State became bound thereby as fully and to the same extent as if it had been a party.

*Gunter v. Atlantic Coast Line,*  
200 U. S. 273.



*Souffront v. Campagne des Sucreries,*  
217 U. S. 475.

*Drummond v. United States,*  
324 U. S. 316.

Appellee is in error in his statement that appellant in bringing its action in the State Court was "completely ignoring the judgment now sought to be enforced." On the contrary, appellant expressly pleaded that judgment as *res judicata* in the action in the Georgia Court and prayed that it be enforced. Appellant went into the Georgia Court first because it feared that an action in the Federal Court might be dismissed under the Johnson Act (28 U.S.C. 1341) on the grounds that appellant had an adequate remedy by declaratory judgment in the State Court. That fear has certainly been removed by the decision of the Supreme Court of Georgia.

#### *No Remedy in Courts of Georgia*

In Section 3 of his motion appellee says that the appeal should be dismissed or affirmed on the grounds that appellant has a plain, speedy and efficient remedy in the courts of Georgia. He does not, however, favor the Court with a statement of what those remedies may be. In the court below he was unable to point out to the Court any plain remedy which appellant might have in the courts of Georgia. On the contrary he admitted in argument that he would contend that any remedy appellant might adopt in the courts of Georgia was not a proper remedy.

Since appellee does not suggest what remedy appellant might have in the courts of Georgia, it would extend this brief too long to discuss every conceivable remedy and show that such remedy is not available.

*Contractual Provision as to Taxes is Valid.*

In Section 4 of his motion, appellee asks the Court to overrule the two prior decisions of this Court upholding the validity of the charter contract on the grounds that the railroad did not build all of the lines it was authorized to build, although this fact was apparent on the record in both of the earlier court cases.

Neither this Court nor any other Court has ever decided that a contractual provision as to taxation in the charter of a railroad is void if the railroad does not exercise every power which it is authorized in its charter to exercise.

Moreover, in this case the statute in question and the subsequent amendatory statutes clearly show that it was contemplated by the legislature that the railroad might not build some of the lines in question and that the contractual provisions as to taxation would apply to those built.

Moreover, the legislature of Georgia acquiesced in the change of plans to build the road to Atlanta to connect with the road being built by the State, rather than to Eatonton as originally planned, and in fact withdrew the right to build the road to Eatonton.

A full discussion of these questions would extend this brief to unreasonable lengths and is more appropriate in an argument on the merits than on summary motion to dismiss or affirm.

Ground No. 5 of his motion, on the grounds that a contractual provision as to taxation in the charter of a railroad is contrary to the Fourteenth Amendment, if sustained, would require a reversal of scores of decisions of this Court upholding such provision. Certainly it is not so plain as not to require argument

that all of such decisions of this Court should be overruled, although never previously questioned by this Court on the grounds suggested by appellee.

*Appellee Concluded by Prior Decree.*

Finally, as pointed out above and in the Assignments of Error and in our original Statement as to Jurisdiction, the previous decree enjoining the predecessor in office of appellee, in an action defended by the duly authorized representatives of the State, is res judicata. Appellant respectfully submits that this question also is substantial and requires argument and consideration of the Court on its merits.

Respectfully submitted,

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